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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ERNEST B., a Person Coming Under
the Juvenile Court Law.

B166197

(Los Angeles County
Super. Ct. No. LK02787)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

ERNEST B., SR.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, D. Zeke Seidler, Referee. Affirmed.

Anna L. Ollinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Lloyd W. Pellman, County Counsel, Stephanie Jo Farrell, Deputy County Counsel, for Plaintiff and Respondent.

Ernest B., the father of Jerome B. and Ernest B., Jr., appeals the denial of his petition pursuant to Welfare and Institutions Code section 388¹ for modification of juvenile court orders regarding custody and visitation. Ernest B. contends the juvenile court abused its discretion by denying his petition without a hearing based on its determination the petition failed both to state new evidence or a change of circumstances and to show the requested modification would promote the best interests of the children. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Initial Dependency Determination and the Children's Placements

Jerome B. and Ernest B., Jr., were removed from their mother, who had a substance abuse problem, and declared dependent children of the court in 1991. Their father Ernest B. could not be located at that time. Although Ernest B. appeared in 1992 and began to visit his sons, he was neither willing nor able to assume custody. Both children were placed in long term foster care in 1993. The initial individual placements for the boys failed, and both resided in a group home for several years. Jerome was hospitalized for suicidal ideation in mid-1999 and thereafter moved to a different group home. Ernest, Jr., was subsequently moved to the same home after manifesting severe behavior problems.

Ernest B., who had a lengthy criminal record, including numerous burglary convictions, as well as convictions for rape and a prior drug offense, was arrested for possession of cocaine for sale in January 1995 and, following his conviction on the new charge, served a state prison term of four years. During his imprisonment Ernest B. wrote to Jerome and Ernest, Jr., and expressed his hope to have them live with him following his release from prison. After Ernest B. was released from prison in 1999 he visited both children in their group homes.

¹ All statutory references are to the Welfare and Institutions Code.

Based on the consistency and quality of Ernest B.'s visits, the Los Angeles County Department of Children and Family Services (Department) in September 2000 recommended liberalized visitation for Ernest B. On September 29, 2000 the court ordered Jerome to have unmonitored visitation with Ernest B. and granted the Department discretion to further liberalize Ernest, Jr.'s visits with his father based on the recommendation of Ernest, Jr.'s therapist.

By March 2001 Ernest B. was enjoying weekly unmonitored day visits with Jerome and twice-monthly unmonitored day visits with Ernest, Jr. In a March 2001 report the Department stated that Ernest B. wanted custody of both Jerome and Ernest, Jr., and indicated both children had expressed their desire to live with their father. At the March 28, 2001 review of permanent plan hearing (§ 366.3), the court gave the Department discretion to liberalize Ernest B.'s visitation to include overnight and weekend visits. However, the court also found at that hearing that continued jurisdiction of the juvenile court was necessary and return of the children to the home of either parent would be detrimental to their best interests. The children remained placed at their group home.

2. The Children's Placement in a New Foster Home

On June 21, 2002 Jerome and Ernest, Jr., who were now 14 years old and 12 years old, were placed in the foster home of Mary A. and Robert A. The Department's report for the September 25, 2002 review of permanent plan hearing stated both children appeared happy. Their foster parents indicated they were willing to care for both children until they reached the age of majority.

At the September 25, 2002 review hearing Ernest B.'s lawyer advised the court that, since the June 2002 placement, Ernest B. had been allowed only monitored visits in placement by the responsible social worker, notwithstanding prior court orders allowing unmonitored visitation. Counsel, however, was unable to direct the court to the specific order he believed allowed unmonitored visitation. The court avoided any direct resolution of this dispute by continuing "all prior orders" in effect and instructing

Ernest B.'s counsel to review the court file and provide the Department's counsel with a copy of the minute order authorizing unmonitored visitation if one existed.² In addition, the court ordered the Department to immediately evaluate Ernest B. for overnight visits and granted the Department discretion to permit such visits with both children. The court continued the hearing to November 7, 2002 for a supplemental report to address the status of overnight visits for father and to consider the possibility of returning the children to Ernest B.

For the November 7, 2002 hearing the Department submitted an interim review report and an updated permanency planning/adoption assessment for both Jerome and Ernest, Jr. The report stated that both children referred to their new foster parents as "mom" and "dad" and appeared to be happy and thriving in their new home. In an interview with the children's social worker responsible for the case, Jerome stated he loves his father and would like to have overnight visits with him. Ernest, Jr., also stated the he loves his father but added he is sometimes afraid of him. He said he would not mind having a whole day to visit with his father but did not want overnight visits because he felt safer at his foster home. Both children told the social worker they largely cared for themselves when they stayed with their father.

The social worker recommended the children not be placed in the home of their father because of serious concerns regarding his "ability to provide a safe, stable, nurturing home environment." The report and recommendation also stated that Ernest B.'s current residence (a single bedroom house) was not large enough to accommodate the children and that he had no beds for them. The children's social

² As discussed above, the court had ordered unmonitored visitation for Jerome on September 29, 2000, and the Department's report for the March 28, 2001 review hearing indicated that Ernest B. had unmonitored visitation with both children. However, no court order for unmonitored visitation with Ernest, Jr., appears in the file. Nonetheless, the court's grant of discretion to the Department on March 28, 2001 to liberalize Ernest B.'s visitation to include weekend/overnight visits with Jerome and Ernest, Jr., certainly suggests the court understood and approved of Ernest B.'s unmonitored day visitation with both boys.

worker also recommended against overnight visits and, in a further supplemental report to the court, suggested that visits between the children and their father be monitored.

At the continued hearing on November 7, 2002, acting on the Department's recommendation, the court set a hearing pursuant to section 366.26 to consider legal guardianship for both Jerome and Ernest B. with their current foster family.³ The court also found continued jurisdiction was necessary and ordered the children to remain in long-term foster care pending the section 366.26 hearing. With respect to visitation, the court refused to order a change from unmonitored to monitored without a further showing from the Department as to the need for such a modification. Because counsel for Jerome and Ernest B. did not agree with Ernest B.'s request for overnight visits, the court also denied that request and continued the prior visitation orders in effect. The court suggested Ernest B. seek more liberalized visitation by filing a petition for modification pursuant to section 388.

3. Ernest B.'s Section 388 Petition

On February 24, 2003 Ernest B. filed a petition for modification pursuant to section 388, directed to the March 8, 1993 order identifying long term foster care as the permanent plan for Jerome and Ernest, Jr. In place of that order Ernest B. requested custody of Jerome and Ernest B. or, in the alternative, overnight weekend visits or full day visits with the two children. In his statement in support of the petition, Ernst B. declared he was "ready and able to have my children placed in my custody" and briefly reviewed the history of his visitation with them (by reference to the Department's reports to the court), including the practical restriction on his visitation rights that had occurred once the children were placed with Mary A. and Robert A. Ernest B. also stated, "If the boys or boy are granted overnights or placement with me, I will get bunk beds if necessary."

³ Ernest B. did seek review of that order by filing a petition for an extraordinary writ as provided by California Rules of Court, rule 39.1B.

On February 28, 2003 the juvenile court denied the section 388 petition without a hearing, finding the petition failed to state new evidence or a change of circumstance and failed to show how the requested modification would promote the best interests of the children. The court interlineated on its printed form order that the denial was “without prejudice to refil[ing].” Rather than attempt to correct any evidentiary deficiencies in his petition, Ernest B. filed a timely notice of appeal from the court’s February 28, 2003 order.

4. Events Subsequent to the Denial of Ernest B. ’s Petition⁴

On May 6, 2003 the juvenile court changed Ernest, Jr.’s permanent plan of long term foster care to a permanent plan of legal guardianship. Ernest, Jr.’s foster parents, Mary A. and Robert A., were appointed his legal guardians. Ernest B. did not appeal the May 6, 2003 order, which is now final.

On June 20, 2003, the juvenile court authorized overnight visits between Jerome and Ernest B.

CONTENTION

Ernest B. contends the juvenile court abused its discretion in denying his section 388 petition without holding a full evidentiary hearing.

DISCUSSION

1. Standard of Review

Section 388 allows a person having an interest in a dependent child of the court to petition the court for a hearing to modify or set aside any previous order on the grounds of change of circumstance or new evidence⁵ if such a change would be in the best interests of the child.⁶ (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526.)

⁴ At the request of the Department we have taken judicial notice of several orders of the juvenile court entered after the denial of Ernest B.’s section 388 petition because of their potential effect on the appeal before us. (Evid. Code, § 452, subd. (d)(1).)

⁵ “Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child

“The parent seeking modification must ‘make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]’ [Citation.]” (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) The prima facie showing includes two factors: The parent must demonstrate (1) a genuine, significant and substantial change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. (*Ibid.*) That is, “the petition must allege a change of circumstances or new evidence that requires changing the existing order.” (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) “It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child.” (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 529.)

“The petition [is] liberally construed in favor of its sufficiency. [Citations.]” (*In re Daijah T.*, *supra*, 83 Cal.App.4th at p. 672.) To be entitled to a hearing, the petitioner “need[] only . . . show ‘probable cause’; [the petitioner is] not required to establish a probability of prevailing on [the] petition. [Citation.]” (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432-433.) If the allegations do not show changed circumstances such that the child’s best interests will be promoted by the proposed change of order, the dependency court need not order a hearing. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806-807.) However, if the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing. (*In re Daijah T.*, *supra*, 83 Cal.App.4th at p. 673.)

of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . .” (§ 388, subd. (a).)

⁶ “If it appears that the best interests of the child may be promoted by the proposed change of order . . . or termination of jurisdiction, the court shall order that a hearing be held” (§ 388, subd. (c).)

We review the juvenile court's summary denial of a section 388 petition for abuse of discretion. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460; *In re Anthony W.*, *supra*, 87 Cal.App.4th at p. 250.)

2. *The Juvenile Court Did Not Abuse Its Discretion In Summarily Denying The Petition For Modification*

Ernest B.'s petition is devoid of any showing of a change of circumstances or new evidence that would justify modification of the court's prior orders placing the children in long-term foster care or limiting Ernest B. to unmonitored, partial day visits with Jerome and Ernest, Jr.

Other than Ernest B.'s statement he loves his children and his conclusory assertion that he is now ready to care for them, the factual allegations in the petition consist of a brief summary of Ernest B.'s visitation history with his children. All this information was before the juvenile court on November 7, 2002 when it set a section 366.26 hearing to consider legal guardianship as the permanent plan for the children -- an order that Ernest B. failed to challenge pursuant to California Rules of Court, rule 39.1B -- and when it maintained the then-current visitation orders that permitted, but declined to require, the Department to allow overnight visits. The only arguably new evidence in the section 388 petition is Ernest B.'s offer to obtain bunk beds for his children if the court permitted them to spend nights with him, a proposal directed to one part of the concern expressed by the Department in its November 7, 2002 interim report that Ernest B.'s residence was not suitable for the two children.

Even when Ernest B.'s allegations are liberally construed in favor of the petition's sufficiency, they fail to establish a prima facie case of "a genuine, significant and substantial change of circumstances." (*In re Anthony W.*, *supra*, 87 Cal.App.4th at p. 250.) Moreover, Ernest B. makes no showing whatsoever as to how the modifications he requests would promote the best interest of his children. (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 529.)

Finally, as the Department suggests in its “no position letter,” submitted in lieu of a respondent’s brief, the juvenile court’s order establishing a legal guardianship for Ernest, Jr., moots Ernest B.’s challenge to the court’s orders identifying long-term foster care as the permanent plan for that child. Similarly, the juvenile court’s order permitting overnight and weekend visits with Jerome moots Ernest B.’s alternative request in his section 388 petition to allow such visitation.

DISPOSITION

The order of the juvenile court is affirmed.

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PERLUSS, P. J.

We concur:

JOHNSON, J.

WOODS, J.